

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

* * *

RICHARD BANDA,

Case No. 2:19-cv-00095-RFB-CWH

Plaintiff,

SCREENING ORDER

v.

JOHN DOE, *et al.*,

Defendants.

Plaintiff, who is a prisoner in the custody of the Nevada Department of Corrections (“NDOC”), has submitted a civil rights complaint pursuant to 42 U.S.C. § 1983 and has filed an application to proceed *in forma pauperis*. (ECF No. 1, 1-1). Plaintiff also has filed a motion for appointment of counsel. (ECF No. 3). The Court now screens Plaintiff’s civil rights complaint pursuant to 28 U.S.C. § 1915A and addresses his motion for appointment of counsel. Because the Court dismisses Plaintiff’s claims with prejudice, the Court denies the motion for appointment of counsel and the application for leave to proceed *in forma pauperis* as moot and closes this case.

23 I. SCREENING STANDARD

24 Federal courts must conduct a preliminary screening in any case in which a
25 prisoner seeks redress from a governmental entity or officer or employee of a
26 governmental entity. See 28 U.S.C. § 1915A(a). In its review, the court must identify any
27 cognizable claims and dismiss any claims that are frivolous, malicious, fail to state a claim
28 upon which relief may be granted, or seek monetary relief from a defendant who is

1 immune from such relief. See 28 U.S.C. § 1915A(b)(1),(2). *Pro se* pleadings, however,
2 must be liberally construed. *Balistreri v. Pacifica Police Dep’t*, 901 F.2d 696, 699 (9th Cir.
3 1990). To state a claim under 42 U.S.C. § 1983, a plaintiff must allege two essential
4 elements: (1) the violation of a right secured by the Constitution or laws of the United
5 States, and (2) that the alleged violation was committed by a person acting under color
6 of state law. See *West v. Atkins*, 487 U.S. 42, 48 (1988).

7 In addition to the screening requirements under § 1915A, pursuant to the Prison
8 Litigation Reform Act (PLRA), a federal court must dismiss a prisoner’s claim if “the
9 allegation of poverty is untrue” or if the action “is frivolous or malicious, fails to state a
10 claim on which relief may be granted, or seeks monetary relief against a defendant who
11 is immune from such relief.” 28 U.S.C. § 1915(e)(2). Dismissal of a complaint for failure
12 to state a claim upon which relief can be granted is provided for in Federal Rule of Civil
13 Procedure 12(b)(6), and the court applies the same standard under § 1915 when
14 reviewing the adequacy of a complaint or an amended complaint. When a court
15 dismisses a complaint under § 1915(e), the plaintiff should be given leave to amend the
16 complaint with directions as to curing its deficiencies, unless it is clear from the face of
17 the complaint that the deficiencies could not be cured by amendment. See *Cato v. United*
18 *States*, 70 F.3d 1103, 1106 (9th Cir. 1995).

19 Review under Rule 12(b)(6) is essentially a ruling on a question of law. See
20 *Chappel v. Lab. Corp. of America*, 232 F.3d 719, 723 (9th Cir. 2000). Dismissal for failure
21 to state a claim is proper only if it is clear that the plaintiff cannot prove any set of facts in
22 support of the claim that would entitle him or her to relief. See *Morley v. Walker*, 175 F.3d
23 756, 759 (9th Cir. 1999). In making this determination, the court takes as true all
24 allegations of material fact stated in the complaint, and the court construes them in the
25 light most favorable to the plaintiff. See *Warshaw v. Xoma Corp.*, 74 F.3d 955, 957 (9th
26 Cir. 1996). Allegations of a *pro se* complainant are held to less stringent standards than
27 formal pleadings drafted by lawyers. See *Hughes v. Rowe*, 449 U.S. 5, 9 (1980). While
28 the standard under Rule 12(b)(6) does not require detailed factual allegations, a plaintiff

1 must provide more than mere labels and conclusions. *Bell Atlantic Corp. v. Twombly*,
2 550 U.S. 544, 555 (2007). A formulaic recitation of the elements of a cause of action is
3 insufficient. *Id.*

4 Additionally, a reviewing court should “begin by identifying pleadings [allegations]
5 that, because they are no more than mere conclusions, are not entitled to the assumption
6 of truth.” *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009). “While legal conclusions can
7 provide the framework of a complaint, they must be supported with factual allegations.”
8 *Id.* “When there are well-pleaded factual allegations, a court should assume their veracity
9 and then determine whether they plausibly give rise to an entitlement to relief.” *Id.*
10 “Determining whether a complaint states a plausible claim for relief . . . [is] a context-
11 specific task that requires the reviewing court to draw on its judicial experience and
12 common sense.” *Id.*

13 Finally, all or part of a complaint filed by a prisoner may therefore be dismissed
14 *sua sponte* if the prisoner’s claims lack an arguable basis either in law or in fact. This
15 includes claims based on legal conclusions that are untenable (e.g., claims against
16 defendants who are immune from suit or claims of infringement of a legal interest which
17 clearly does not exist), as well as claims based on fanciful factual allegations (e.g.,
18 fantastic or delusional scenarios). See *Neitzke v. Williams*, 490 U.S. 319, 327-28 (1989);
19 see also *McKeever v. Block*, 932 F.2d 795, 798 (9th Cir. 1991).

20 **II. SCREENING OF COMPLAINT**

21 In the complaint, Plaintiff sues multiple Doe defendants for events that took place
22 while he was detained at the Clark County Detention Center (“CCDC”).¹ (ECF No. 1-1 at
23 1). Plaintiff alleges two counts and seeks damages and declaratory relief. (*Id.* at 9, 14-
24 15.)

25 **A. Count I**

26 Count I alleges the following: In April of 2017, Plaintiff experienced symptoms of

27
28 ¹ It appears, therefore, that Plaintiff was a pre-trial detainee at the time of the
alleged events.

1 dehydration and fainted in his cell. (*Id.* at 5). Plaintiff fainted again when the medical
2 team arrived, and a doctor shot Plaintiff with steroids and sent him to the medical unit for
3 further evaluation. (*Id.*) Once in the medical unit, the medical staff put Plaintiff on an I.V.
4 for dehydration. (*Id.*) The doctor specifically told the medical staff to flush and clean the
5 I.V. two times a day, for two days, and then remove it. (*Id.*) The medical staff neglected
6 the doctor's instructions and failed to flush, clean, and remove the I.V. (*Id.*)

7 Five days later, the doctor returned and witnessed an infection because the I.V.
8 was left uncleaned, unflushed, and still unremoved. (*Id.* at 6). The doctor ordered the
9 I.V. removed and said that Plaintiff should be okay, ordered medication for Plaintiff, and
10 told medical staff that Plaintiff could go back to the regular unit. (*Id.*)

11 Plaintiff soon began experiencing chills and sweats and broke out in hives. (*Id.*)
12 His arm swelled up where the I.V. had been. (*Id.*) Plaintiff called a man down. (*Id.*)
13 When the medical team arrived and took his temperature, Plaintiff was told that he was
14 running a very high temperature, so he was given a blood test. (*Id.*) When the blood test
15 results came back, Plaintiff was diagnosed with a blood infection and was sent to the
16 hospital. (*Id.*)

17 At the hospital, Plaintiff was administered antibiotics, which did not help. (*Id.*) After
18 a few days, Plaintiff developed holes in his chest and stomach which were releasing a
19 poisonous discharge. (*Id.* at 7). Medical staff at the hospital performed a procedure and
20 determined that Plaintiff had a staph infection in his blood that was due to the neglect of
21 not flushing, cleaning, and removing the I.V. from his arm. (*Id.*) Plaintiff was subjected
22 to pain and suffering as a result of the neglect. (*Id.*) He still was suffering from the same
23 discharge from his chest and stomach at the time he filed the complaint. (*Id.*)

24 Plaintiff alleges that this conduct violated his Eighth Amendment rights. (*Id.* at 5.)
25 Because it appears that Plaintiff was a pre-trial detainee at the time the alleged events
26 occurred, the Court construes this claim as a Fourteenth Amendment due process claim.
27 A pretrial detainee's right to be free from punishment is grounded in the Due Process
28 Clause. See *Pierce v. Cnty. of Orange*, 526 F.3d 1190, 1205 (9th Cir. 2008). Thus, a

1 pretrial detainee's claim against individual defendants for violation of rights concerning
2 medical care is evaluated under Fourteenth Amendment law. *Gordon v. Cty. of Orange*,
3 888 F.3d 1118, 1124–25 (9th Cir. 2018). A pretrial detainee's claim of denial of the right
4 to adequate medical care under the Fourteenth Amendment is analyzed under an
5 objective deliberate indifference standard. *Id.* The elements of such a claim are: "(i) the
6 defendant made an intentional decision with respect to the conditions under which the
7 plaintiff was confined; (ii) those conditions put the plaintiff at substantial risk of suffering
8 serious harm; (iii) the defendant did not take reasonable available measures to abate that
9 risk, even though a reasonable official in the circumstances would have appreciated the
10 high degree of risk involved—making the consequences of the defendant's conduct
11 obvious; and (iv) by not taking such measures, the defendant caused the plaintiff's
12 injuries." *Id.* at 25. "With respect to the third element, the defendant's conduct must be
13 objectively unreasonable, a test that will necessarily 'turn[] on the facts and
14 circumstances of each particular case.'" *Id.* (quoting *Castro v. County of Los Angeles*,
15 833 F.3d 1060, 1071 (9th Cir. 2016)). A plaintiff must "prove more than negligence but
16 less than subjective intent—something akin to reckless disregard." *Id.* The mere lack of
17 due care is insufficient. *Id.*

18 The Court finds that Plaintiff fails to state a colorable Fourteenth Amendment claim.
19 Although he alleges a serious medical need, he does not allege facts sufficient to show
20 deliberate indifference by anyone. He does not allege that anyone intentionally caused
21 him to get an infection. He also does not allege that anyone was aware that he would get
22 or was getting an infection but consciously chose to allow that infection or consciously
23 chose not to treat Plaintiff effectively. Rather, he expressly alleges negligence. Because
24 negligence does not constitute a Fourteenth Amendment violation, Plaintiff fails to state
25 a colorable Fourteenth Amendment claim. The Court therefore dismisses this count with
26 prejudice, as amendment would be futile.

27 If Plaintiff wishes to pursue a negligence claim, he must do so in state court, not
28 this court. A negligence claim is a state law claim, not a federal constitutional claim. To

1 state a claim under 42 U.S.C. § 1983, a plaintiff must allege that a right secured by the
2 Constitution or laws of the United States was violated. *West*, 487 U.S. at 48. Section
3 1983 does not provide a cause of action for violations of state law. See *Galen v. County*
4 *of Los Angeles*, 477 F.3d 652, 662 (9th Cir. 2007).

5 **B. Count II**

6 Count II alleges the following: Plaintiff was diagnosed with a blood infection due to
7 the medical staff not flushing the I.V. (ECF No. 1-1 at 8). Blood infections are known to
8 attack all major functions in the body. (*Id.*) Two of the vital organs attacked by blood
9 infections are the heart and the liver, which perform major bodily functions. (*Id.* at 8-9).
10 Plaintiff asserts that he was not afforded the same care as others, even when medical
11 staff was directed to do so. (*Id.* at 9.) Plaintiff alleges that this violated his Fourteenth
12 Amendment right to equal protection and his rights under the Americans with Disabilities
13 Act (“ADA”). (*Id.* at 8.)

14 “The ADA prohibits discrimination because of disability, not inadequate treatment
15 for disability.” *Simmons v. Navajo County, Ariz.*, 609 F.3d 1011, 1022 (9th Cir. 2010);
16 see also *Marlor v. Madison County Idaho*, 50 Fed. App’x 872, 874 (9th Cir. 2002) (holding
17 that inadequate medical care does not provide a basis for an ADA claim unless medical
18 services are withheld due to discrimination on the basis of disability). The ADA does not
19 provide a cause of action for not receiving medical treatment while incarcerated. See
20 *Bryant v. Madigan*, 84 F.3d 246, 249 (7th Cir. 1996).

21 In order to state an equal protection claim, a plaintiff must allege facts
22 demonstrating that defendants acted with the intent and purpose to discriminate against
23 him based upon membership in a protected class or that defendants purposefully treated
24 him differently than similarly situated individuals without any rational basis for the
25 disparate treatment. *Lee v. City of Los Angeles*, 250 F.3d 668, 686 (9th Cir. 2001); see
26 also *Vill. of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000). Conclusory allegations of
27 motive are insufficient; specific, non-conclusory factual allegations are required. *Jeffers*
28 *v. Gomez*, 267 F.3d 895, 913-14 (9th Cir. 2001). Thus, a person cannot state an equal

1 protection claim merely by dividing all persons not injured into one class and alleging that
2 they received better treatment than the plaintiff did. See *Thornton v. City of St. Helens*,
3 425 F.3d 1158, 1167 (9th Cir. 2005).

4 Here, it is apparent that Plaintiff does not and cannot state an ADA claim or an
5 equal protection claim. Plaintiff does not allege intentional conduct. Furthermore, even
6 assuming that Plaintiff is considered disabled due to the effects of the infection, it is clear
7 from the allegations of the complaint that the people at CCDC who provided the allegedly
8 inadequate health care relating to the I.V. could not have done so *because of* that
9 disability. Instead, the complaint alleges that it was the inadequate health care that
10 subsequently caused the disability. Therefore, Plaintiff does not allege facts sufficient to
11 show discrimination. Accordingly, the Court dismisses the ADA and equal protection
12 claims with prejudice, as amendment would be futile.

13 **III. MOTION FOR APPOINTMENT OF COUNSEL**

14 Plaintiff has filed a motion for appointment of counsel. (ECF No. 3). A litigant does
15 not have a constitutional right to appointed counsel in 42 U.S.C. § 1983 civil rights claims.
16 *Storseth v. Spellman*, 654 F.2d 1349, 1353 (9th Cir. 1981). Pursuant to 28 U.S.C. §
17 1915(e)(1), “[t]he court may request an attorney to represent any person unable to afford
18 counsel.” However, the court will appoint counsel for indigent civil litigants only in
19 “exceptional circumstances.” *Palmer v. Valdez*, 560 F.3d 965, 970 (9th Cir. 2009) (§ 1983
20 action). “When determining whether ‘exceptional circumstances’ exist, a court must
21 consider ‘the likelihood of success on the merits as well as the ability of the petitioner to
22 articulate his claims pro se in light of the complexity of the legal issues involved.’ *Id.*
23 “Neither of these considerations is dispositive and instead must be viewed together.” *Id.*
24 In the instant case, the Court is dismissing with prejudice both counts, mooted Plaintiff’s
25 request for appointment of counsel. Therefore, the Court denies the motion for
26 appointment of counsel.

27 **IV. CONCLUSION**

28 For the foregoing reasons, IT IS ORDERED that Count I is dismissed with

1 prejudice, as amendment would be futile.

2 IT IS FURTHER ORDERED that Count II is dismissed with prejudice, as
3 amendment would be futile.

4 IT IS FURTHER ORDERED that Plaintiff's application to proceed *in forma pauperis*
5 (ECF No. 1) is denied as moot.

6 IT IS FURTHER ORDERED that Plaintiff's motion for appointment of counsel (ECF
7 No. 3) is denied as moot.

8 IT IS FURTHER ORDERED that the Clerk of the Court shall send a copy of this
9 Order to Plaintiff.

10 IT IS FURTHER ORDERED that this action shall be dismissed with prejudice for
11 failure to state a claim. The Clerk of Court is instructed to close this case.
12

13 DATED this 19th day of August, 2019.



14
15 RICHARD F. BOULWARE, II
16 UNITED STATES DISTRICT JUDGE
17
18
19
20
21
22
23
24
25
26
27
28